No. 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Petitioner,

v.

AARON ZACKS and FLORENCE ZACKS,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF ANTON LORENZ AND IRENE LORENZ AS AMICI CURIAE

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The intention of these *amici curiae* is to bring clearly to the attention of the Court one aspect of the question as presented in the briefs of both parties which they consider important to the Court's understanding of the problem, and of the scope of the statute under consideration.

Although Mrs. Zacks was the holder of about fourteen patents at the time of trial and substantially all her income was derived from royalties based thereon, the Court of Claims made no finding as to whether she was a professional or an amateur inventor, and the Government's brief assumes that she was an amateur. The distinction in the effect of P. L. 629 on amateur inventors as com-

pared with professional inventors is quite significant, as will be brought out below. Since the Court's decision in this case may affect both classes, the *amici curiae*, who are admitted by the Government as entitled to the tax treatment accorded to professional inventors, desire to present to the Court the distinction and its legal effects.

These *amici curiae* are plaintiffs in another case in the Court of Claims in which refund is requested by virtue of P.L. 629, the statute involved in the *Zacks* case. The Government filed a motion for summary judgment in the *Lorenz* case on the basis of the statute of limitations, and the court below on December 6, 1961 denied the motion (296 F. 2d 746), on the grounds of the *Zacks* decision, and on the further ground not mentioned in *Zacks* that as to professional inventors such as the *amici curiae* new law was established by reason of the enactment of P. L. 629, and the statute of limitations must therefore be considered to have begun to run from the date of its enactment, in accordance with its earlier decisions in *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901, and *Verckler* v. *United States*, 170 F. Supp. 802.

I. The cardinal rule of statutory construction is to give effect to what Congress did.

In 1956 the Congress of the United States, in P. L. 629 of the 83rd Congress (70 Stat. 404), enacted Section 117 (q) of the Internal Revenue Code, providing that as of 1950 professional inventors should be entitled to capital gains treatment on qualifying sales of patents, and amateur inventors selling patents on a royalty basis should be entitled to capital gains treatment. The capital gains treatment accorded professional inventors was clearly new law for the years 1950 to 1954, since theretofore they were required to report as ordinary income, by admission of the Government (Gov. Br., pp. 11 and 40), while the Gov-

ernment argues that the benefits accorded amateur inventors was simply clarification of existing law. The *amici curiae*, being conceded by the Government to be entitled to treatment as professional inventors (Gov. Br., page 44), first became eligible to file refund claims under this legislation in 1956 when the new law was enacted, the statute of limitations for such claims having previously expired. The issue as to them is whether, by having granted retroactive relief that did not previously exist, but having said nothing about extending the period for filing claims, Congress intended that the statute of limitations should begin to run from the date of the enactment, or only that those who might for some other reason have had claims pending were entitled to the benefit of the legislation, and that the statutory benefits should not apply to those professional inventors who did not have open claims.

The Government's initial argument is that to construe P. L. 629 as granting an additional period for filing refund claims is to disregard the cardinal rule of statutory construction that a subsequent statute ought not be deemed to repeal a previous one by implication in the absence of positive repugnancy. This language was based on the Court's opinion in *United States* v. *Borden*, 308 U.S. 188, 198, which reads in part:

> "It is a cardinal principal of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."

No question of repeal by implication is involved here. P. L. 629 does not purport to repeal the statutes of limitations applicable to tax claims. The real question is whether, by granting retroactive relief, the Congress intended that the existing statutes of limitation should begin to run, as to the new relief it granted, from the date the remedial legislation was enacted, or from the original date of payment. In the latter event, the claims period

would have expired prior to the enactment of the relief measure.

The controlling inquiry in the Court's consideration of this question is, of course, the intention of Congress. The legislative purpose of the provision giving retroactive capital gains benefits to professional inventors was to grant relief which did not otherwise exist to professional inventors for the years beginning in 1950. The Government's position would completely nullify this purpose. In *United States* v. *Menasche*, 348 U.S. 528, 538, relating to a savings clause contained in a statute, the Court took occasion to say:

> "The Government's contention . . . would defeat and destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' *N.L.R.B.* v. *Jones & L. Steel Corp.*, 301 U.S. 1, 30., 81 L. ed. 893, 907, 57 S. Ct. 615, 108 A.L.R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U.S. 147, 152, 27 L. ed. 431, 432, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires."

The Court should attempt to give coherence to what Congress has done. *Achilli* v. *United States*, 353 U.S. 373, 378. If possible ambiguity exists, the problem is to attempt to reconcile the two statutes to give effect to each. *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U.S. 193, 202.

II. The clearly expressed intention of Congress to give retroactive relief to professional inventors would be frustrated by denying them the opportunity to file claims.

The direct result of the Government's position is that the retroactive relief intended by Congress to be granted would be denied to all but those who had for some reason filed refund claims. However, the Government has not

made reference to a single statement in the legislative history of P. L. 629 indicating that Congress intended in any manner to restrict the benefits of the retroactive relief provision to a specific group such as those who had made claim theretofore. This Court should require some such showing before reading such an inequitable intention into remedial Congressional action. As the Court said in *Shapiro* v. *United States*, 335 U.S. 1, 31, the Court should read a statute "in a manner which effectuates rather than frustrates the legislative draftsmen".

The Government in its brief states that such legislation is often enacted to apply to a specific case or controversy. However, this is not usually done by public laws, such cases being taken care of by private acts which by their terms grant relief to specific persons. Private legislation extending the statute of limitations in particular cases is not uncommon in especially meritorious cases. See, for example, Priv. L. No. 86-339 as supplemented by Priv. L. No. 87-553 (H. R. Rep. No. 1317, 86th Cong., 2d Sess., and H. R. Rep. No. 1405, 87th Cong., 2d Sess.), and H. R. 4141 of the present Congress passed by the House of Representatives (H. R. Rep. No. 525, 88th Cong., 1st Sess.). It is true that general legislation may be intended to benefit a particular taxpayer or a group of taxpayers, but in every such case a clear legislative intention is shown to do so. There is nothing in the committee reports or debates on P. L. 629 to show that it was intended to relate only to taxpayers who had filed claims which were still pending, or who had initiated litigation prior to its enactment. In fact, insofar as taxpayers in the position of the *amici curiae* were concerned, the filing of a claim or suit prior to P. L. 629 would have been a useless thing, since prior thereto professional inventors had no legal basis under any of the provisions of the Internal Revenue Code of 1939 to receive capital gains treatment on the sale of patent rights which, in their hands, represented

stock in trade and not capital assets (Section 117(a)(1), Internal Revenue Code of 1939).

The Government's argument that the purpose of P. L. 629 would not have been frustrated if a new filing period were not intended may apply to a situation where litigation and claims were pending, on the basis of which legislative clarification is sought. However, it does not apply to the case of professional inventors, where unless a new period for filing claims was established, the express intention of Congress, clearly stated in the committee reports to grant retroactive relief, would be nullified.

The legislative history in connection with the relief granted to professional inventors under P. L. 629 indicates that Congress intended the capital gains treatment made available to professional inventors to apply retroactively for the years 1950 to 1954, and no others, from which it could much more easily be concluded that it intended to allow refund claims only for those years, than that it intended to grant relief only to those who had filed refund claims for those years. As applied in the present situation to professional inventors, where new law was established and new rights created which according to settled authority did not previously exist, so that there was no basis theretofore for filing claim, it is more reasonable to conclude that Congress intended to begin the running of the statute of limitations from the date the relief was provided.

In determining whether a retroactive statute implicitly extends the period for filing claims, the Government recognizes the merit in the rationale of the Fifth Circuit Court of Appeals, which ruled in the Government's favor, establishing the test under which it would recognize the creation of a new right if Congress modifies prior law, as distinguished from clarification of obscurities or resolution of disputed issues. The given basis for the Government's preference of this position over that of the Court

of Claims is that a taxpayer who has reason to expect that the courts will uphold his position can scarcely excuse his failure to file a timely refund claim on the ground that the Commission would have contested it.

Following this rationale, since the Government admits that P. L. 629 eliminated the distinction between amateur and professional inventors (Gov. Br., page 11, footnote 2, and page 40), it follows that professional inventors could not have been expected, prior thereto, to file refund claims, knowing that the courts would have denied them.

The Government's brief indicates that any objections to the Fifth Circuit's classification might be met by treating as right-creating statutes only those which make a clear break with prior law, and not those clarifying obscurities or resolving disputed issues. Further, the Government argues, retroactive measures are intended solely to relieve the hardship of a particular taxpayer whose years are still open, in which cases such legislation may or may not create new rights, so that the legislative purpose can be accomplished without creating a new period for filing claims for other taxpayers. In cases where legislation was enacted only for the benefit of particular persons, Congress has consistently expressed such intention in its committee reports or floor debates. Moreover, the ability and desire of certain taxpayers to press for remedial legislation does not justify the conclusion that Congress intended to benefit only those few and to withhold applicability of the statute from similarly situated taxpayers who have been less active. It is exactly this result which would flow from the adoption of the Government's position—that a professional inventor who had without basis filed a refund claim would be benefited, while the other taxpayers who had correctly concluded that there was no sound basis for making such claim would be penalized for their law-abiding behavior. In the language of the opinion of the Court in *Reconstruction Fi-*

nance Corporation v. *Prudence Group*, 311 U.S. 579, 582, the existence of the right to file claim or suit "would be subject to contingencies which no degree of diligence could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted."

The Government's position would place a premium on the filing of frivolous claims by taxpayers on the possibility of the passage of retroactive legislation to be made applicable to them even though at the time claim was filed it was entirely unfounded. However, the Treasury Department would eliminate even that possibility, since it requires a taxpayer to sign the form prescribed for claims for tax refund (Form 843) certifying under the penalty for perjury that his statements are true and correct, and that he believes the claim should be allowed. Further, after denial of the claim, suit must be commenced, and Rule 11 of the Federal Rules of Civil Procedure and Rules of the United States Court of Claims both provide that the signature of an attorney to a pleading constitutes a certificate that there is a good ground to support it, and that it is not interposed for delay. Similarly, Canon 30 of the Canons of Professional Ethics of the American Bar Association provides that an attorney's appearance is equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

The Government argues that the relief granted to professional inventors was incidental to the principal purpose of P. L. 629, and was simply a windfall, since the sole purpose of Section 117(q) as its legislative history shows was to settle the controversy between the courts and the Commissioner, and it was only because Section 117(q) followed the language of Section 1235 enacted two years earlier that it happened to liberalize the treatment of patent transfers in a manner favorable to professionals. In fact, the Congressional committees were well aware of

the effect of their action on professional inventors, as indicated by the detailed discussions in the committee reports appended to the Government's brief (pages 54-55, 59 and 61), and purposely included a specific provision in the legislation retroactively eliminating the distinction in treatment between amateur and professional inventors. Such relief was not incidental to the elimination of the dispute between the courts and the Commissioner. Perhaps the problem that caused Congress to take up the subject was the existence of the dispute, but P. L. 629 goes far beyond the area of the difference between the judicial and administrative interpretation, and in fact made other changes in the law not under consideration in this litigation. But even assuming, *arguendo*, that the granting of relief to professional inventors was incidental, this is no basis for concluding that Congress really did not intend to do what both the specific language of the statute and the explanatory discussions contained in its committee reports indicated to be its action and the purpose thereof.

The Government points to the alleged oversight of Congress in failing to specify whether the two, three or six year statute of limitations should begin to run from the date of the enactment of P. L. 629. The lower federal courts have adopted the theory of constructive payment on the date of enactment, making the two year statute applicable. However, in the *Lorenz* case claim was filed in a matter of days after the enactment of the remedial statute, and where the intention of Congress to grant relief is so clear, the frustration of that intent should not be grounded on a technical matter of drafting which for purposes of the consideration of the bulk of the claims involved is moot. Certainly claims under P. L. 629 are barred after six years, the only question being whether the two or three year statute may apply. Thus statutes of limitation do exist, the only question being which is applicable, Congress having established the new remedy.

The courts have the authority and the responsibility to make this determination, in order that the clearly expressed purpose of the statute to grant retroactive relief should not be defeated.

The legislative history of P. L. 629 demonstrates that as to professional inventors the Congress was well aware of the fact that it was changing the law, and did so quite purposefully (Gov. Br. pp. 54, 59 and 61). In the absence of any evidence to the contrary, there is no basis for concluding that Congress intended to restrict its relief to any particular group of professional inventors. Therefore the only conclusion to be reached from the Government's line of argument is that Congress deliberately did a useless thing. Certainly such a purpose cannot be imputed.

III. A study of other retroactive statutes indicates that both the executive and legislative branches of the federal government abhor discriminatory measures treating persons similarly situated differently, and clearly so provide in any legislative action having that effect.

The Government's brief appends a summary of retroactive tax measures enacted from 1953 through 1962. It is submitted that the conclusions properly to be drawn from this summary are as follows:

1. In most cases where Congress' attention was called to the situations of a limited number of taxpayers, the statute of limitations was nevertheless opened up for all, showing a non-discriminatory policy in enacting retroactive tax legislation (Gov. Br., pp. 73, 80, 85, 104 and 105).

2. Where legislation was enacted specifically for the benefit of a limited number of taxpayers, the committee reports or floor debates reflect this (Gov. Br., pp. 73, 76, 80, 85, 100, 104, 105, 133, 136, 139, 148, and 149).

3. The Congressional intent to avoid discriminatory treatment was also brought out in legislation specifically opening the statute of limitations for those who had not filed claims (Gov. Br., pp. 95 and 98).

4. In most instances where the statute of limitations was not generally extended, the legislation involved either estate taxes, where it becomes undesirable to reopen closed estates, or statutes which apply to both closed and open years, in which case the entire purpose of the statute would not be defeated by failure to extend the period of limitations (Gov. Br., pp. 76, 126, 129, 132, 135, and 144).

The Government further argues that because in a number of other legislative measures wherein retroactive relief was granted, specific extensions of the statute of limitations were included, while in others such extensions were omitted, Congress was aware of the limitations problem, and its silence in this instance indicates its intention not to extend the statutory period. It is to be noted that in a number of instances where no extension of time was included, the Government argues that the legislative history showed that none was intended, and that in a number of others where specific additional periods were provided, the history showed that Congress intended relief for specific years only or to grant relief only to those who had previously filed claims for those years. This reasoning does not apply to a situation such as that relating to professional inventors, where Congress did not clarify an existing statutory uncertainty, and where the affected taxpayers had no legal basis for having filed claim or suit prior to the new legislation.

To impute to Congress an intention to discriminate between a professional inventor who without basis in statute or judicial decision may have filed claim for refund asserting capital gains treatment for the years 1950 to 1954, prior to the enactment of P. L. 629 in 1956 granting retroactive relief, while depriving those taxpayers who had not filed claims, which certainly must include most of

these who could be benefited by the relief provision, of any remedy, would be to rewrite the statute so as to produce an inequitable result which could only be justified by the most clearly stated expression of Congressional intent to do so. No such discriminatory intent appears here.

The President as well as the Secretary of the Treasury has taken a strong position against discriminatory tax legislation which does not treat alike all taxpayers similarly situated. In the President's 1963 Tax Message, he specifically stated regarding his recommendation with respect to employees' moving expenses:

> "In order to facilitate labor mobility and provide more equal treatment of similarly situated taxpayers, I recommend appropriate extension of this tax benefit to new employees."

H. Doc. No. 43, 88th Cong., 1st Sess, January 24, 1963, page 17. The Secretary of the Treasury similarly pointed to the gross inequality in the treatment of taxpayers existing in this tax provision (*Ibid.*, page 50), and in connection with group life insurance referred to the unfair treatment of employee-purchased life insurance (*Ibid.*, page 51). In a report to the Senate Finance Committee in opposition to a bill which would provide retroactive relief to television component manufacturers who had not paid taxes for the years 1950 to 1954, but would make no provision for the extension of the statute of limitations governing the filing of refund claims on the part of taxpayers who had paid taxes during those years, he pointed out that the taxpayers who had not paid such taxes had obtained a competitive advantage, that "Manufacturers who used tax-paid tubes could not apply for credit or refund in most cases, since most or all of their taxable years prior to September 1, 1955 are probably closed by the statute of limitations", and that "The proposed change in the law would constitute legislative approval of this advantage." Report dated August 21, 1963 to the Senate Finance Committee on S. 1151, 88th Cong., 1st Sess.

IV. Conclusion

With respect to taxpayers accorded treatment as professional inventors, as to whom P. L. 629 granted new relief providing for the first time the right to file refund claims for the years 1950 to 1954, the Court should attempt to carry out the intention of Congress, and to avoid the nullification of the Congressional purpose which would result from construing the statute as withdrawing the only remedy by which the right granted by the legislation could be realized.

Respectfully submitted,

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